UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 718

Case No. 808: GAV3HIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 26 September 1994, Vladimir Gavshin, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"(a) To rescind the decision of the Secretary-General not to extend the Applicant's contract beyond 30 April 1993;

...

(e) To order the Applicant's immediate reinstatement with reasonable consideration at the earliest opportunity for a permanent appointment;

(f) To order that all adverse evaluations on his competence outside the scope of his official performance evaluations be removed from the Applicant's official file;

(g) To order payment of full salary and applicable allowances and benefits from the date of the Applicant's separation from service to the date of reinstatement;

(h) To award the Applicant additional appropriate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the

Applicant to his career and reputation as a result of the Respondent's actions or lack thereof;

(i) To fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at 3 years' net base pay in view of the special circumstances of the case;

(j) To award the Applicant, as costs, the sum of $2,000.00."

Whereas the Respondent filed his answer on 6 February 1995;

Whereas the Applicant filed written observations on 22 March 1995;

Whereas, on 6 November 1995, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 10 April 1985, on a six-month fixed-term appointment, at the P-3, step IV level, as a Law of the Sea Officer in Kingston, Jamaica. His appointment was extended repeatedly, for periods varying from one to twenty-two months, through 30 April 1993, when he separated from service upon the expiration of his last appointment.

The Applicant's initial Letter of Appointment stated that he was "on secondment" from the Government of the Union of Soviet Socialist Republics (USSR). Subsequent Letters of Appointment through January 1992 also contained this provision. Thereafter, his Letters of Appointment contained no reference to secondment.

In a letter dated 7 May 1990, the Deputy Permanent Representative of the USSR to the United Nations submitted to the Assistant Secretary-General, Office of Human Resources Management (OHRM), the names of three candidates "to replace [the Applicant], who has been serving with the Organization on secondment from the Soviet Government ... on a fixed-term appointment which expires on 30 June 1990." In a letter dated 17 May 1990, the Special Assistant to the Special Representative of the Secretary-General for the Law

of the Sea (the Special Representative) advised the Director of the Recruitment and Placement Division, OHRM, that it would be "useful if these ... candidates could be interviewed and also any others who may have the required qualifications for the post." He therefore requested an extension of the Applicant's contract for a period of three months. This extension was granted, with the consent of the USSR Government, through 30 September 1990.

In a memorandum dated 24 September 1990, the Special Assistant to the Special Representative informed the Director of the Recruitment and Placement Division, OHRM, "that two important projects in which [the Applicant] has been specially involved are still in progress and that a reasonable period would be needed for him to complete these two assignments." He noted that "it would be preferable that we retain [the Applicant's] services and defer the recruitment of his replacement for the present". He further stated that the Permanent Mission of the USSR would not object to the Applicant's continuation for another one year period. The Applicant's appointment, on secondment, was consequently extended, through 30 September 1991.

On 27 June 1991, the Applicant requested that his fixed-term appointment be extended beyond its expiration date. On 12 July 1991, the Special Representative informed the Assistant Secretary-General, OHRM, that his office had no objection to the requested extension. He noted, however, that as the Applicant was on secondment, the approval of his government would be required. He added that he would request a one year extension of the Applicant's appointment.

On 2 November 1991, a Senior Personnel Officer, OHRM, advised the Applicant that OHRM had approved the extension of his fixed-term contract through 30 September 1992, subject to "receipt by the Organization of written confirmation that you have severed any ties you may have had with your Government." He further stated, "should you not wish to sever ties with your Government at this time, and

wish to be considered for a fixed-term appointment on the basis of the secondment, please notify us (...), so that we may seek the concurrence of your Government to such an appointment." In a reply dated 22 November 1991, the Applicant advised the Senior Personnel Officer that he had severed any ties with his Government.

In a letter of the same date, the Applicant advised the Permanent Representative of the USSR to the United Nations, "In view of the fact that the United Nations has offered me an extension of my present appointment, I am hereby submitting my resignation from the government service."

In a letter dated 29 February 1992, the Senior Personnel Officer, OHRM, informed the Applicant that the extension of his contract was being prepared. He further noted:

> "I have taken note of your voluntary resignation from Government service. In this regard I must inform you that your resignation does not obligate the United Nations Organization to retain your services at the end of your current fixed-term appointment nor does it oblige the Organization to either grant you a probationary or permanent appointment at the end of your current fixed-term appointment."

In a Note for the File, dated 19 August 1992, the Administrative Officer, Office of Legal Affairs (OLA), which was responsible for the Kingston Office in 1992, recorded that the Applicant had telephoned him to say that he had recently been informed, by the Director of the Division of Ocean Affairs and the Law of the Sea (DOALOS), that his contract, which was due to expire on 30 September 1992, would be extended only until the end of the year. The Applicant asked whether this decision was final. He was advised that it had been made by the Director, DOALOS, who had explained that it was "based on a number of factors not the least of which was the restructuring of the Organization that was currently underway, and the need to free up posts for this purpose."

In a memorandum dated 22 December 1992, the Administrative Officer, OLA, noted that the Applicant had "been actively seeking other post openings with the Organization" and requested a two month extension of his appointment through 28 February 1993, "in order that we may bridge the gap that would otherwise occur between posts." On 19 March 1993, another Administrative Officer, OLA, requested "a second and final two-month extension of [the Applicant's] fixed-term appointment effective 1 March through 30 April 1993." He noted that, after this date, the post encumbered by the Applicant would be considered for redeployment.

On 27 April 1993, the Applicant filed a complaint with the Panel on Discrimination and Other Grievances (the Panel on Discrimination), claiming that "I have never received reasonable consideration for conversion to a probationary or permanent appointment." On 30 April 1993, the Applicant submitted a request to the Staff Administration and Training Division, OHRM, for "conversion of my fixed-term appointment to a permanent appointment with retroactive effect."

On 30 April 1993, the Applicant separated from service.

In a letter dated 21 May 1993, the Applicant requested the Secretary-General to review the decision to separate him from service. On 30 July 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 30 August 1993, the Coordinator of the Panel on Discrimination informed the Director of Personnel, OHRM, of its conclusions and recommendations which read as follows:

"III. CONCLUSIONS

14. The Panel believes that in view of [the Applicant's] eight years of fully satisfactory service he had an expectancy of continuing employment with the Organization. Further, although he can not be considered at fault for not applying for a career appointment immediately after

completing five years of fully satisfactory service, he did, in fact, apply for a conversion of his fixed-term appointment to a career appointment later (...). There is no evidence that this request was given any consideration.

15. OHRM's request for [the Applicant's] resignation from Government service was not made with the intention of considering him for a career appointment, which makes the Panel question as to whether that request was made in good faith. In having complied with OHRM's request, [the Applicant] has suffered injury by losing the opportunity of reemployment with his Government as well as pension and other benefits.

16. It is the Panel's opinion that, prior to the resignation request, the administration had an obligation to explain to the staff member its implications vis-à-vis career possibilities at the UN.

IV. RECOMMENDATIONS

17. The Panel recommends that:

a. [The Applicant] be reappointed effective 1 May 1993;

b. Pursuant to GA resolution 37/126, para. 4, [the Applicant] be immediately and retroactively considered for a career appointment."

In a reply dated 8 February 1994, the Officer-in-Charge, Staff Administration and Training Division, OHRM, advised the Coordinator of the Panel on Discrimination as follows: "I note that your report does not contain any evidence of prejudice or discrimination against [the Applicant] but highlights what the Panel perceived to be administrative shortcomings". Since these were being considered by the JAB in the context of the Applicant's appeal, it "would be inappropriate for OHRM to make any further comments on this matter."

In the meantime, in a memorandum dated 13 December 1993, the Director, DOALOS, informed the Administrative Officer, OLA, in connection with the Applicant's appeal to the JAB, that "the

discrepancy between the high ratings given to [the Applicant] in his performance evaluation reports (PER) and his actual performance" could be explained by his secondment status. He claimed that the system of PERs, "as customarily applied to Soviet nationals, was skewed" by their rotation and that their PERs were "inevitably always positive and favourable" as "a negative performance rating would, under the then prevailing climate, have prompted a political dispute." He claimed that the Applicant's ratings were not justified by his performance.

The JAB adopted its report on 3 May 1994. Its conclusion and recommendation read as follows:

> "18. The Panel concludes that Appellant was denied the reasonable consideration and due process to which he was entitled.
>
> 19. Basing itself on the considerations of the UNAT in the cases of Vitkovski and Rylkov (Judgement No. 559) and on the parallels which can be drawn between this case and the 'flawed procedures and irregularities' of theirs, the Panel recommends that Appellant be paid 18 months of his net base salary as of the date of his separation from the Organization.
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> 20. In arriving at its conclusion and recommendation, members of the Panel were perfectly aware that many supervisors give staff members ratings of mainly A (excellent) or B (very good), with an occasional C (good), on their PERs. This is a long-standing practice. The Panel recalls, however, that the current PER system was introduced, according to ST/AI/240 of 3 January 1977, 'with a view to ensuring a fair, consistent and objective assessment of a broad range of the staff member's performance and abilities and to eliciting specific information that will contribute to the staff member's career development.' It appears that the Administration takes one position in principle, in general and in public and ignores it in a specific case in private - as it has done here. Either the PER exercise is a valid and meaningful exercise, or it is not. Guided by Tribunal judgements in similar situations, the Panel has - for the

purposes of this case - taken the position that PERs are valid and meaningful. If it has erred, then the staff at large, as well as members of the various JAB panels, should be informed accordingly."

On 13 July 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised him as follows:

"The Secretary-General has examined your case in the light of the Board's report and has taken note of its conclusion that you were denied the reasonable consideration and due process to which you were entitled in respect of consideration for a career appointment. The Secretary-General has decided to accept the recommendation of the Board that you be paid 18 months of your net base salary as of the date of your separation from the Organization".

On 26 September 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Upon completion of five years of continuous good service, the Applicant became entitled to, yet was unfairly denied, every reasonable consideration for a career appointment. This constituted a violation of his contractual rights.

2. The Respondent's decision to refuse the Applicant reasonable consideration for a permanent appointment was tainted by improper motives and by capricious, extraneous and prejudicial influences.

3. Although the Respondent accepted the recommendations of the JAB and granted the Applicant compensation, a miscarriage of justice was committed by failing to recognize that the only appropriate remedy in this instance is reinstatement and consideration for a career appointment.

Whereas the Respondent's principal contentions are:

1. The Applicant was employed on a fixed-term contract which expired on its terms.

2. The Applicant's performance demonstrated his unsuitability for a career appointment and for any extension of his fixed-term appointment.

3. The Applicant has been fully compensated for the procedural irregularities that occurred.

The Tribunal, having deliberated from 2 to 21 November 1995, now pronounces the following judgement:

I. In the aftermath of the Tribunal's pronouncements on secondment, the Applicant was told, on 2 November 1991, that the award to him of a new fixed-term appointment would be subject to receipt by the Organization of written confirmation that he had severed his ties with his Government. He was also told that if he did not wish to sever his ties with his Government and wished to be considered for a fixed-term appointment on the basis of his secondment, he should notify the Organization so that it might seek the concurrence of his Government.

The Applicant severed his ties with his Government. He was then informed that such severance did not place an obligation on the Organization - either to retain his services at the end of his then current fixed-term appointment or to grant him a permanent appointment.

II. The Applicant was informed in August 1992, by the Administrative Officer, OLA, that his contract would not be extended beyond the end of 1992, one of the reasons being that the Organization was being restructured. Hence, there was a necessity

to free-up posts for this purpose. The Applicant was told to make efforts to obtain a post within the system and that he would be helped to obtain interviews with OHRM.

On the basis of this interchange, the Applicant might well have thought that he was not being abandoned, that he was, in fact, being considered for further appointment, if the circumstances, including his performance, permitted such an appointment. A memorandum dated 13 December 1993, from the Director, DOALOS, discloses that performance evaluation reports (PERs) for Soviet nationals were always positive and favourable but that this accurately reflected the situation only in some cases. The Director says it did not do so in the Applicant's case, and that his PERs which showed overall "a very good performance" were not justified by the quality of his performance.

This practice existed apparently for political reasons. As far as the Applicant was concerned, there was also, according to the Director, DOALOS, the reason that the signatory of the PER was at Headquarters and was not in a position to deal with the quality of the Applicant's work in Kingston. However, any question relating to the quality of the Applicant's performance should have been brought to his attention when he was asked to sever his ties with his government. But this was not done.

III. Whatever his true status in relation to secondment, the Applicant was not informed, until after he had severed relations with his Government, of the Organization's views of its obligations to him in regard to re-appointing him. He thus lost any contractual right or opportunity that he might have had to further employment in his Government.

The Applicant was then told that his appointment would not be extended because of restructuring within his Department. This, of course, was not the real reason. As subsequently disclosed, in the memorandum of 13 December 1993 referred to above, the real reason

was disapproval of the Applicant's performance. He was thus misled by the Administration and he was never given the kind of consideration to which he was entitled. He had served the Organization faithfully for over eight years, since 1985, and his PERs were, as far as he could tell, uniformly positive. He was entitled to expect that he would receive the fair consideration due to him.

IV. The Respondent concedes that proper procedures were not followed. He says that there is no basis for the supposition that, had proper procedures been followed with respect to the completion of the Applicant's PERs, and the consideration to which he was entitled for a career appointment, he would have been recommended for an extension of his fixed-term contract.

V. It is not possible, of course, to know whether the Applicant would have obtained a further appointment or a career appointment, after proper consideration. This, however, is not the issue. The real point is that the Applicant, after having been misled, was never, in a real sense, afforded the opportunity to receive either appointment.

The Tribunal considers that the Applicant's treatment by the Administration in this case fell short of the standards to which it is required to adhere.

VI. The Tribunal recognizes the rationale for the Joint Appeals Board's (JAB) recommendation on damages, and has approved it in other cases involving similar issues. However, the Tribunal's independent assessment of this case has led it to conclude that the case presents a more extensive violation of the rights of the Applicant than the Vitkovski and Rylkov cases cited by the JAB. Here, the level of injury must be considered greater.

VII. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of six months of his net base salary, at the rate in effect on the date of his separation from service, in addition to the 18 months he has already received, in accordance with the Secretary-General's decision of 13 July 1994.

VIII. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary